Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL RIDER JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the United States Constitution bar a successive prosecution when the second indictment alleges offenses prior to the date of the offense for which the defendant has been acquitted?

II.

Does the doctrine of collateral estoppel bar the Government from attempting to relitigate the single element of actual possession of a firearm when the Government presented evidence of actual possession of the firearms at trial and the second indictment alleges offenses prior to the date of the offense for which the defendant has been acquitted?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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CITATION OF THE OFFICIAL REPORTS OF THE OPINIONS ENTERED IN THIS CASE

The Opinion of the Eleventh Circuit Court of Appeals was issued on October 18, 2004. The Opinion is unpublished. Appendix App. 1.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eleventh Circuit entered its judgment on October 18, 2004. Appendix App. 1. Petitioner Michael R. Jackson ("Jackson") seeks review of that judgment on a writ of certiorari.

On November 5, 2004, Jackson timely filed a petition for rehearing en banc in the Court of Appeals. On February 4, 2005, the Court of Appeals filed an order denying both a petition for rehearing and the petition for rehearing en banc. Appendix App. 35.

This Court has jurisdiction under 28 U.S.C. § 1254 to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V, Double Jeopardy Clause which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTORY PROVISIONS INVOLVED IN THE CASE

18 United States Code § 922(g)(1) states in pertinent part:

§ 922. Unlawful acts

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

This case presents the question of whether the Double Jeopardy Clause of the United States Constitution bars the successive prosecution of an individual for a violation of 18 U.S.C. § 922(g)(1) when the second indictment also alleges a violation of 18 U.S.C. § 922(g)(1) for the possession of the same firearms of whose possession the defendant was acquitted when the dates alleged in the second indictment are prior to the date of the offense for which

the defendant has been acquitted. In the alternative, this case also presents the question of whether the doctrine of collateral estoppel bars the Government from attempting to relitigate the single element of actual possession of a firearm when the Government presented evidence of actual possession of the firearms at trial and the jury acquitted Jackson of possessing either of the firearms in question. Appendix App. 6, n.1.

On June 27, 2002 a one-count Grand Jury indictment was returned alleging that on or about January 17, 2002, the appellant, MICHAEL R. JACKSON ("Jackson") was a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). Appendix App. 36. Jackson proceeded to trial on December 9, 2002 and on December 10, 2002, a jury returned a verdict of not guilty. Appendix App. 42.

On June 10 2003, a second one-count Grand Jury indictment was returned alleging that on or between February 2001 and April 9, 2001, in violation of 18 U.S.C. § 922(g)(1) Jackson had possessed two of the firearms whose possession he had previously been acquitted of. Appendix App. 43.

Jackson filed a Motion to Dismiss on the Grounds of Double Jeopardy and/or Collateral Estoppel asserting the Government was unconstitutionally engaged in successive prosecutions of him in violation of the Double Jeopardy Clause of Amendment V to the Constitution of the United States or in the alternative that the doctrine of collateral estoppel precluded the Government from relitigating facts decided by the jury during the December 2002 trial in Jackson's favor. On December 3, 2003, a Magistrate Judge filed a Report and Recommendation denying Jackson's

Motion. Appendix App. 22. On January 27, 2004, the District Judge filed his Memorandum Opinion and Order. Appendix App. 10. In conclusion, the District Judge rejected in part the Magistrate Judge's Recommendation and adopted with modification that portion of the Recommendation which concluded Jackson's Motion to Dismiss was due to be denied. Appendix App. 21.

Jackson timely filed an interlocutory appeal with the Court of Appeals for the Eleventh Circuit, which holds jurisdiction under 28 U.S.C. § 1292. The Court of Appeals filed its opinion on October 18, 2004. Appendix App. 1. Jackson petitioned the Court of Appeals for rehearing or rehearing en banc, and on February 4, 2005, the Court of Appeals filed an order denying rehearing and rehearing en banc. Appendix App. 35.

The Court of Appeals held that "because the two firearms charged in the 2003 Indictment were seized from the safe in the 2002 case, Jackson has established a prima facie case of double jeopardy." Appendix App. 5. The appellate court also assumed that "the jury acquitted Jackson of possessing either of these guns on January 17, 2002." Appendix App. 6, n.1. However, the court then found that "because the possession of these guns by Jackson's wife in January 2002 would interrupt any possession by Jackson in February through April 2001, the Government is not attempting to arbitrarily carve the possession into separate offenses." Appendix App. 6. It also determined that "the underlying facts of the 2002 Indictment are not the sole basis for the 2003 Indictment." Appendix App. 6.

This result conflicts with the holdings of the Supreme Court which address the question of whether a successive

prosecution is a violation of the Double Jeopardy Clause in *Abbate v. United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729; *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651; *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *In re Nielsen*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889) and other cases. This result also conflicts with the Circuit's own holdings in *United States v. Rivera*, 77 F.3d 1348 (11th Cir. 1996); *United States v. Benefield*, 874 F.2d 1503 (11th Cir. 1989); *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990) and other Eleventh Circuit cases. Additionally, the result conflicts with the holdings of the Sixth and Ninth Circuits in *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976), *cert. denied*, 431 U.S. 964, 97 S. Ct. 2919, 53 L. Ed. 2d 1059 (1977) and *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993).

The Court of Appeals also addressed Jackson's collateral estoppel assertion and found that "the defendant has not proved by convincing and competent evidence that the Government is planning to relitigate anything the jury already found." Appendix App. 8. At trial the Government did presented testimonial evidence that Jackson had handled one or more of the guns in the time period prior to the date of the 2002 Indictment. Appendix App. 54. The Court of Appeals held that because the 2003 Indictment states that Jackson is alleged to have had possession of the two firearms "on, about, or between February 2001, and April 9, 2001," a "subsequent verdict of conviction will not be rationally inconsistent with the prior verdict of acquittal." Appendix App. 9.

The holding as to the issue of collateral estoppel is in conflict with and inconsistent with the Court's holdings in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d

469 (1970) as well as other cases. In addition, the result is inconsistent with the Circuit's own holdings in *United States v. Boldin*, 818 F.2d 771 (11th Cir. 1987); *Adams v. United States*, 287 F.2d 701 (5th Cir. 1961); *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975); *United States v. Ballard*, 586 F.2d 1060 (5th Cir. 1978); *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972); *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993) as well as others.

Jackson asks that this Court grant his petition for a writ of certiorari to conform the Court of Appeals decision to existing Supreme Court authority and to harmonize the Court of Appeals result with the decisional law of its own circuit as well as that of other circuits and to correct a result that, if undisturbed, will carve out an extensive exception to the Double Jeopardy Clause in the Eleventh Circuit.

ARGUMENT

A. The Court of Appeals Decision Fails to Follow an Opinion of the Supreme Court and Conflicts with an Opinion of the Circuit and with Opinions of Other Circuit Courts in its Interpretation of the Double Jeopardy Clause of the United States Constitution.

By finding that the possession of the firearms by Jackson's wife in January 2002 would interrupt any possession by Jackson in February to April 2001 there is no double jeopardy in the successive prosecution. The decision conflicts with existing and well-established

Supreme Court doctrine and with published case authority from not only the Court of Appeals own Circuit, but also with published case authority from other circuits. The published case authority calls for a finding that the alleged possession by Jackson of the firearms on January 17, 2002 is the end date of one uninterrupted course of conduct, that the Government is attempting to arbitrarily carve this conduct into separate offenses, and only one prosecution can be appropriate for the course of conduct which ended on January 17, 2002. Throughout his interlocutory appeal Jackson has asserted that the Government is unconstitutionally attempting to carve a single possession into separate offenses in order to attempt to avoid the Double Jeopardy. Such a finding compels a result opposite to that reached by the Court of Appeals.

1. The Court of Appeals Decision Fails to Follow Existing Supreme Court Decisions.

In the present matter, the Government first prosecuted Jackson for the possession of a group of firearms on January 17, 2002. Appendix App. 36. At trial the Government presented evidence that Jackson had actual possession of the firearms through testimony that he had physically possessed them, Appendix App. 54, and constructive possession based on the fact that he had keys to gun safes in his pants pocket. Appendix App. 6. The jury acquitted him of being a felon in possession of firearms in violation of 18 U.S.C. § 922(g)(1). Appendix App. 42. Six months after the acquittal, the Government brought a second indictment against Jackson, again alleging Jackson had violated 18 U.S.C. § 922(g)(1) again by the possession of two of the same firearms. Appendix App. 43. This time

the Government selected a period of time prior to the date they had selected in the first indictment. Jackson asserts that the successive prosecution following his acquittal is a violation of the Double Jeopardy Clause.

In 1889, this Court first construed the meaning of "same offense." *In re Nielsen*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889). Nielsen first pled guilty to unlawful cohabitation between October 15, 1885 and May 13, 1888 as charged in the first indictment. A successive indictment charged him with adultery on May 14, 1888. Even though the statutes involved required the proof of a different element and the adultery charge alleged a separate time for the offense, the *Neilsen* Court held that the second prosecution was barred.

In doing so, the Court held that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *Nielsen*, 131 U.S. at 188, 9 S. Ct. at 676.

Although the Court of Appeals cited *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), it evidently failed to follow it and apply either the *Blockberger* test or the *Neilsen* test. The issue which seems to have escaped the attention of the Court of Appeals is simply that this is a successive prosecution following an acquittal and not a question of whether the Government is attempting to "arbitrarily carve a possession into separate offenses." Appendix App. 5. As Justice Scalia wrote in commenting upon Justice White's opinion in *United States v. Dixon*, "we do not share his 'pragmatic' view, that the meaning of the Double Jeopardy Clause depends upon our

approval of its consequences." *United States v. Dixon*, 509 U.S. at 700.

Section 922(g)(1) clearly criminalizes the possession of a firearm by a convicted felon. However, the statute clearly shows Congressional intent was to prosecute an individual for the possession of one or more firearms as a single offense. It also intended to prosecute the individual not for a series of related offenses, but for a continuing possessory interest. In the instant matter, Jackson was prosecuted for a violation of 18 U.S.C. § 922(g)(1) in the first indictment, he was acquitted by a jury and now is being hailed before the same court for having committed the same violation, only this time six months before the date of the first indictment. If the Government had chosen to prosecute him at the first trial for separate acts, it may have been able to do so, however, it did not.

As this Court held in *Dixon*, "in both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. See, *e.g.*, *Brown v. Ohio*, 432 U.S. 161, 168-169, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977); *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342, 55 L. Ed. 489, 31 S. Ct. 421 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

The three elements of a violation of 18 U.S.C. § 922(g)(1) are first, that the individual must have been convicted of a felony punishable by imprisonment for more than one year. Second, that the individual *possessed* the firearm. And third, that the firearm traveled in interstate commerce. The single element at issue in this matter is *possession*. In composing the statute, Congress could have made separate offenses of either physically possessing a firearm or of constructively possessing a firearm. They did not. The statute forbids a convicted felon to possess a firearm. It does not matter whether the individual constructively possesses the gun or actually physically possesses it; both are violations of the statute. There is no difference. The possession Congress intended to prohibit was one of continuing possessory interest, regardless of the type of possession. Thus, the Court of Appeals is clearly incorrect in its finding that the element in question is one of where the defendant was and where the firearms were, that is, location of possession. Appendix App. 5. The statute does not make location an element, only possession, criminal status, and the interstate nexus. Thus, by the test first announced by this Court in *Neilsen*, this successive prosecution after an acquittal is, and can only be, Double Jeopardy.

As Justice Souter wrote in his concurring opinon in *Dixon*:

> The interests at stake in avoiding successive prosecutions are different from those at stake in the prohibition against multiple punishments, and our cases reflect this reality. The protection against successive prosecutions is the central protection provided by the Clause. . . . *Brown v. Ohio*, 432 U.S. 161, 165, 52 S. Ct. 2221, 2225, 76 L. Ed. 2d 187 (1977) (quoting *United States v.*

Jorn, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (plurality opinion)).

The Double Jeopardy Clause prevents the government from "making repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) . . . .

Consequently, while the government may punish a person separately for each conviction of at least as many different offenses as meet the *Blockburger* test, we have long held that it must sometimes bring its prosecutions for these offenses together. If a separate prosecution were permitted for every offense arising out of the same conduct, the government could manipulate the definitions of offenses, creating fine distinctions among them and permitting a zealous prosecutor to try a person again and again for essentially the same criminal conduct. While punishing different combinations of elements is consistent with the Double Jeopardy Clause in its limitation on the imposition of multiple punishments (a limitation rooted in concerns with legislative intent), permitting such repeated prosecutions would not be consistent with the principles underlying the Clause in its limitation on successive prosecutions. . . . Thus, "the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual

> issues already resolved by the first." *Brown*, 432 U.S. at 166-167, n.6.

Dixon, 509 U.S. 746-748.

This Court has held for a long time that the Government "must sometimes bring its prosecutions for . . . offenses together." *Id.* To allow otherwise would provide the Government with the opportunity to hone "its trial strategies" and perfect "its evidence through successive attempts at conviction," *Tibbs v. Florida*, 457 U.S. 31, 41, 72 L. Ed. 2d 652, 102 S. Ct. 2211 (1982).

During the December 2002 trial, the Government presented their evidence of Jackson's possession. This was a two-pronged theory. The first prong was based upon constructive possession – the gun safe keys in his pants pocket. Appendix App. 6. The second prong was based on actual possession – testimony that he had physical possession of them at the time prior to the date alleged in the 2002 Indictment. Appendix App. 54. The Government's theory of the case in the December 2002 trial clearly demonstrates that the Government was suggesting a continuing possessory interest. By doing so, they foreclosed a successive prosecution based solely upon the physical possession on a date prior to January 2002. As this Court stated in *Hudson v. United States*, "the Double Jeopardy Clause forbids the government from even "*attempting* a second time to punish criminally." (emphasis in the original by Chief Justice Rehnquist). *Hudson v. United States*, 522 U.S. 93, 101, 118 S. Ct. 488, 495, 139 L. Ed. 2d 450, 462 (1997) (citation omitted).

In *Brown v. Ohio*, this Court emphasized the vitality of the *Neilsen* test and noted that its decision in *Brown* "merely restates what has been this Court's understanding

of the Double Jeopardy Clause at least since *In re Neilsen* was decided in 1889." *Brown*, 432 U.S. at 163-164.

With *Brown*, the Court explicitly recognized that the *Blockburger* test is only the first step in analyzing whether a successive prosecution charges the same offense. "Even if two offenses are sufficiently different to permit the imposition of consecutive sentences (under *Blockburger*), successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Id.* at 166, n.6. In the instant matter, the offense is the same one, that is, a violation of 18 U.S.C. § 922(g)(1). There is no separate offense. The sole element at question is the possession of a firearm. *Blockburger* is intended for those cases where "the same act or transaction constitutes a violation of two distinct statutory provisions" *Blockburger*, 284 U.S. at 303-304, and that is not the case in the instant matter. Both the 2002 and the 2003 allege a violation of a single statute, 18 U.S.C. § 922(g)(1), the question is may the Government successively prosecute Jackson for a violation of 18 U.S.C. § 922(g)(1) in February to April 2001 after he was acquitted of a violation of 18 U.S.C. § 922(g)(1) in January 2002 with the same guns.

The holding of the Court of Appeals would allow the Government, if it so chooses, to prosecute the possession of a single gun by a single convicted felon on different dates after an acquittal, as individual separate offenses. The problem with the Court of Appeals holding is that the analysis does not at all consider this Court's clear precedent as to Double Jeopardy in *Neilsen, Blockburger, Hudson, Helvering, Dixon*, or *Brown*. Double Jeopardy applies to the successive prosecution of Jackson just as it did to the successive prosecution of Neilsen.

2. The Court of Appeals Decision Conflicts with the Sixth, Seventh and Ninth Circuit's Approach to This Issue.

For the purposes of its analysis of Jackson's Double Jeopardy claim, the Court of Appeals assumed that in December 2002 the jury acquitted him of the possession of both firearms listed in the 2003 Indictment. Appendix App. 7, n.1. In addition, the Court of Appeals found that Jackson had "established a prima facie case of double jeopardy." Appendix App. 7. At no time during the course of these proceedings did the Government demonstrate, even through a proffer, that it could meet the standard set out in *United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002). The Seventh Circuit in *United States v. Conley*, adopted a position that Congress intended that persons convicted of a violation of 18 U.S.C. § 922(g)(1) should only be punished for possessing weapons in separate courses of conduct. *Conley*, 291 F.3d at 470. See also *United States v. Horodner*, 993 F.2d 191 (9th Cir. 1993) and *United States v. Jones*, 533 F.2d 1387 (6th Cir. 1976). The Eleventh Circuit has abridged the analysis of a double jeopardy claim to the point that a successive prosecution may be undertaken for an event during a continuous possession if that event or event occurred prior to the terminating event. Thus, while in the Sixth Circuit a felon may only be charged and convicted of possessing the same firearm in a subsequent prosecution only if the Government can show that the defendant possessed the weapon, that he is aware that his possession has been interrupted and finally that he reacquired possession of the firearm himself. *Conley*, 291 F.3d at 470.

In *Jones*, the Sixth Circuit closely examined what constituted a course of conduct in relation to the possession of one or more firearms. Contrary to the result of the Eleventh Circuit, the Sixth Circuit found that "the return of an indictment charging a course of conduct prevents the relitigation of any course of conduct charged in the indictment which is tried or dismissed with prejudice and which occurred prior to the return of the indictment." *Jones*, 533 F.3d at 1391. The 2003 Indictment is attempting to relitigate a course of conduct which occurred prior to the conduct charged in the 2002 Indictment and prior to the intervening event of the December 2002 acquittal. In its analysis of Jackson's Double Jeopardy claim, the Eleventh Circuit appears to have applied a "same facts" test to determine whether Jackson's double jeopardy claim should stand, Appendix App. 7, and arrived at the conclusion that since the different counts require proof of possession at different times and places the offenses are separate. Appendix App. 8. However, the Eleventh Circuit disregarded the fact that the correct statement of the same facts test is found in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), which held that an offense can be punished separately under two statutes if one statute requires proof of a fact which the other does not. *Jones*, 533 F.3d at 1391-92. This rule was applied to a case where a defendant was convicted under two counts of violating the same statute, in *United States v. Noble*, 155 F.2d 315, 318 (3d Cir. 1946). In that instance the Third Circuit said:

> To determine whether the offenses are the same the test is whether each count requires proof of a fact which the others do not.

The Sixth Circuit found that test to be inappropriate for an offense involving a course of conduct. *Jones*, 533 F.3d at 1392. Thus the Eleventh Circuit is clearly in conflict with the Third, Sixth, Seventh and Ninth Circuits in its holding that Double Jeopardy does not exist if the underlying facts of an indictment, for which the defendant has been acquitted, are not the sole basis for a successive indictment. Appendix App. 8.

In *Jones*, the Sixth Circuit concluded that if the "same facts" test were applied to a course of conduct violation such as possession of a firearm by a felon, the result in the cases listed hereinabove could not be reached, since each count would include a different fact, namely, a different weapon. *Jones*, 533 F.3d at 1392.

As the Sixth Circuit wrote in its opinion in *Jones*, "a course of conduct involves a number of acts. To hold that proof of a different act under a separate count establishes a separate offense would destroy the principle that a course of conduct is punishable as only one offense." *Jones*, 533 F.2d at 1392. In conclusion, the Sixth Circuit cited this Court's holding in *Bell v. United States*, which states that "when an Act of Congress is ambiguous as to the allowable unit of prosecution, doubts are resolved in favor of lenity for the accused." *Bell v. United States*, 349 U.S. 81, 83, 99 L. Ed. 905, 75 S. Ct. 620 (1955). Thus, the Sixth Circuit concluded that Jones can be convicted upon only one count of possession. *Jones*, 533 F.2d at 1392. However, if Jones was in the Eleventh Circuit, he could be convicted for five separate counts of possession each occurring on a different day during the course of the conduct.

3. The Court of Appeals Decision Fails to Follow Existing Circuit Precedent.

It is well settled in the Eleventh Circuit that once a defendant has established a prima facie case of double jeopardy, then the burden of persuasion shifts to the government to demonstrate by a preponderance of evidence that no constitutional violation exists. See *United States v. Nino*, 967 F.2d 1508, 1510 (11th Cir. 1992).

In it's Opinion, the Court of Appeals cited *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir. 1996) in support of its position that the Government was not improperly attempting to arbitrarily carve a possession into separate offenses. The *Rivera* Court found that "where there is not proof that possession of the same weapon is interrupted, the Government may not arbitrarily carve a possession into separate offenses." *Rivera* at 1351. In essence, the Court of Appeals held that the jury's acceptance at the December 2002 trial of Jackson's defense that his wife possessed the guns during the first trial somehow interrupts his alleged possession some six to eight months earlier. This finding quite simply eliminates Congressional intent to "punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm." *United States v. Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976), *cert. denied*, 431 U.S. 964, 97 S. Ct. 2919, 53 L. Ed. 2d 1059 (1977). This finding allows the Government to pick any date prior to January 17, 2002 and prosecute Jackson quite literally as many times as necessary to achieve a conviction. In *Rivera*, the defendant was indicted for possession of the same weapon on two separate dates. At trial, the jury acquitted the defendant of possession of the firearm on one of the dates, but could not come to a verdict on the other. A mistrial was declared,

and the defendant contended that the Government could not prosecute him for possession of the weapon on the date for which the mistrial was declared as it would be a violation of the Double Jeopardy Clause. *Id.* at 1351. The defendant in *Rivera* contended that he had been charged with a continuous and uninterrupted possession of the same weapon and that a finding of not guilty as to the February 5, 1995, date constituted a finding of not guilty as to the continuing offense. *Id.* at 1351.

However, the key fact in the *Rivera* case is that the jury in *Rivera* was unable to reach a verdict as to one of the dates charged in the indictment and the district court declared a mistrial. *Id.* at 1350. Thus, the protection of the Double Jeopardy Clause did not apply because it is only applicable "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325, 104 S. Ct. 3081, 3086, 82 L. Ed. 2d 242 (1984) (citations omitted). In *Rivera*, unlike the instant matter, jeopardy had not terminated. The 2002 Indictment charged Jackson with possession of firearms on January 17, 2002. Appendix App. 36. In the second indictment, he is charged with possession of two of the same firearms between February and April 2001, almost a full year earlier. Appendix App. 43. Between the two is the terminating event of his acquittal on December 10, 2002. Appendix App. 42. There was no mistrial as there was in *Rivera*. The *Rivera* holding would be on point in this situation only if there had been a mistrial declared. There was not. The appellate court has incorrectly applied precedent of the circuit in reaching its decision. *Rivera*, regardless of how one reads it, does not stand for the proposition that the possession of the guns by Jackson's wife on or about January 17, 2002 interrupts

an alleged possession by Jackson nearly a year earlier between February and April 9, 2001.

The Court of Appeals failed to apply its own precedential case law in this matter. Its decision in *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990) is controlling. Perhaps the clearest statement in the *Mars* opinion is found at Footnote 9. Although dicta, it clearly sets out the Eleventh Circuit's position on how to determine if a prosecution is barred by the Double Jeopardy Clause.

> The *Neilsen* test was inapplicable to the facts in *Blockburger*. In *Blockburger*, the defendant challenged the imposition of multiple punishments in the same trial for "the same offense" – a single sale of drugs. The *Neilsen* test is only applicable to succesive prosecutions. Under *Neilsen*, if an individual has been convicted (or acquitted) in one trial, the state may not prosecute that individual again by proving "incidents" already adjudicated in the first trial.

Mars v. Mounts, 895 F.2d at 1354, n.9.

During the first trial, Government witnesses stated that Jackson was in possession of the firearms on January 17, 2002 by virtue of having the keys to the gun safes in his pants' pocket, Appendix App. 6, and that Jackson had been seen handling the firearms at a date prior to that specified on the 2002 Indictment. Appendix App. 54.

By its terms, 18 U.S.C. § 922(g)(1) makes it a crime for a convicted felon to "possess" any firearm that in any way affects interstate commerce. The Eleventh Circuit, has concluded that possession, in the context of § 922(g)(1), requires that the defendant knowingly possess the firearm, *United States v. Billue*, 994 F.2d 1562, 1565 n.2 (11th

Cir. 1993), *cert. denied*, 510 U.S. 1099, 114 S. Ct. 939, 127 L. Ed. 2d 230 (1994), and possession may be proven either by showing that the defendant actually possessed the firearm, or by showing that he constructively possessed the firearm. *United States v. Pedro*, 999 F.2d 497, 500 (11th Cir. 1993); *United States v. Sweeting*, 933 F.2d 962 (11th Cir. 1993); *United States v. Winchester*, 916 F.2d 601, 605 (11th Cir. 1990). Thus the evidence presented by the Government during the December 2002 trial was sufficient to show both actual and/or constructive possession. Either is sufficient to support a conviction under 18 U.S.C. § 922(g)(1), and both were presented to the jury in December 2002 and the jury rejected the Government's theory of the case and found Jackson not guilty of possessing firearms, including the two that are the subject of the 2003 Indictment.

In its successive prosecution the Government is alleging that Jackson possessed two of the firearms during a period of time approximately eight months prior to the date of the 2002 indictment. Appendix App. 43.

The Court of Appeals held that since the Government intends to show Jackson held the firearms in question between the dates of February 2001 and April 9, 2001 and because the possession by Jackson's wife of these firearms in January 2002 interrupted any prior possession by Jackson in 2001 the Government is not attempting to arbitrarily carve the possession into separate offenses. Appendix App. 6. This is belied by the testimony the Government presented at the first trial alleging that Jackson had physically handled the firearms prior to the date of the 2002 Indictment.

The Court of Appeals cited *Rivera*, 77 F.3d at 1351 in support of its finding that an event in January 2002 could interrupt possession approximately six to eight months earlier. Appendix App. 7. A careful reading of *Rivera* clearly shows that the *Rivera* Court, although discussing continued possessory interest of a firearm, does not indicate what they would consider to constitute an interruption of that possession. It would appear that since a mistrial was declared, that fact alone was sufficient for the Court to determine that the Double Jeopardy Clause did not bar a second prosecution. *Rivera*, 77 F.3d at 1351-52.

There clearly was no determination by the *Rivera* Court as to what constituted an interruption of possession. Certainly, this case presents a set of circumstances which calls for this Honorable Court to exercise discretion, intervene, and grant Jackson's Motion to Dismiss the 2003 Indictment on the basis of an unconstitutional violation of the Double Jeopardy Clause.

B. The Court of Appeals Decision Fails to Follow an Opinion of the Supreme Court and Conflicts with an Opinion of the Circuit in its Interpretation of the Doctrine of Collateral Estoppel.

The collateral estoppel rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to run the gantlet a second time. *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469, 476 (1970).

1. The Court of Appeals Decision Fails to Follow Existing Supreme Court Opinion.

It is abundantly clear that this Court's decisions have established the rule that in criminal cases collateral estoppel is not to be applied with a hypertechnical and archaic approach similar to that of a 19th century pleading book, but with realism and rationality. *Id.* However, where there was a previous judgment of acquittal based upon a general verdict, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yawn v. United States*, 244 F.2d 235 (5th Cir. 1957) The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579, 68 S. Ct. 237, 240, 92 L. Ed. 180, 185 (1948). Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

The decision by the Court of Appeals has evidently failed to adequately examine the record of the prior proceeding since it held that there was no evidence in the record that the Government had presented testimony of Jackson's physical possession of the firearms. Appendix App. 54. This is clearly not the case as is shown by the testimony of Charles Jackson which specifically informed the jury that he had personally observed Jackson in physical possession of the firearms. Appendix App. 54.

2. The Court of Appeals Decision Conflicts with its Prior Opinions on This Issue.

In deciding whether it can identify the basis for the acquittal at the first trial for purposes of determining whether collateral estoppel applies, the appellate court is required to examine the entire record of that proceeding and to take into account the pleadings, evidence, charges, and other relevant matters, such as closing arguments and jury instructions. It is essential in this inquiry to apply the presumption that a jury follows its instructions. *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993) The Court of Appeals appears to have limited its inquiry into the record to pleadings, evidence, charges associated with the 2003 Indictment. Had it taken into account the testimony of Charles Jackson at the December 2002 trial, it would have noted that Charles Jackson testified to Jackson's physical possession of some of the firearms at a date earlier than that of the 2002 Indictment. Appendix App. 54. This would have precluded the finding that the difference between the 2002 trial and the 2003 Indictment is Jackson's physical possession of the firearms themselves and not simply his possession of the keys to the gun safes. Appendix App. 8. The Court of Appeals should have found that the Government was attempting to prove Jackson's physical possession of the firearms in the 2002 trial and has alleged physical possession in the 2003 Indictment. Such a finding would preclude the result that a "subsequent verdict of conviction [would] not be 'rationally inconsistent with the prior verdict of acquittal.'" Appendix App. 9.

In *United States v. Brown*, Brown presented no other evidence or argument at his first trial to any element of

the offense other than willfulness. A lack of willfulness was his only defense just as lack of identity was the only defense in the first trial involved in *Ashe v. Swenson*. See *United States v. Brown*, 983 F.2d 201, 204 (11th 1993) (citation omitted). Just as willfulness and identity were the single elements of the defense in *Brown* and *Ashe*, the issue of possession is the single element contested by Jackson in the first trial. The Government has repeatedly conceded that it intends to try the element of physical possession in the prosecution of the 2003 Indictment. Appendix App. 18. 18 U.S.C. § 922(g)(1) requires there to be "knowing possession" as one of the three elements of the offense.

Collateral estoppel will completely bar prosecution "if a fact necessarily determined in a former trial is an essential element of a conviction." *United States v. Bennett*, 836 F.2d 1314, 1316 (11th Cir.) (emphasis omitted) (citation omitted), *cert. denied*, 487 U.S. 1205, 108 S. Ct. 2847, 101 L. Ed. 2d 884 (1988). 18 U.S.C. § 922(g)(1) makes possession an essential element of the offense. The "finding of fact must be inconsistent with a finding of guilt in a second trial." *Id.* (citing *United States v. Hewitt*, 663 F.2d 1381, 1387 (11th Cir. 1981)). As discussed hereinabove, possession is a course of conduct which Congress has decided to punish as a single violation. Jackson could have been convicted in December 2002 if the jury had found that he possessed the firearms either by virtue of having the gun safe keys in his pants pocket or by having physically handled them as testified to by Charles Jackson. Either fact would have been sufficient to provide the element of possession for a conviction. The December 2002 jury heard both the evidence of the gun safe keys in Jackson's pocket and the eyewitness testimony of the

alleged physical handling. It is clear by their verdict that they had reasonable doubt as to the Government's theory of the case and decided that Jackson was not guilty. Appendix App. 42.

The Circuit Court's opinion that the 2003 Indictment is not barred by collateral estoppel rests upon the single issue that "the trial on the 2002 Indictment concerned whether Jackson possessed the firearms because he had in his possession the key to the gun safe on January 17, 2002," Appendix App. 8, and upon the finding that a subsequent verdict of conviction would not be "rationally inconsistent with the prior verdict of acquittal," *Brown*, 983 F.2d at 204, because the Government is alleging actual physical possession and firing of the weapons between February and April 9, 2001. Appendix App. 9.

However, it is clear from the testimony of Charles Jackson that the Government had presented evidence of physical possession during the trial on the 2002 Indictment. Appendix App. 54. With the evidence of both the keys and the physical possession before the jury, it would be rationally inconsistent for a finding of guilty should a second trial be held and a second jury find Jackson guilty. *Id.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certioari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-1052
Non-Argument Calendar

D.C. Docket No. 03-00129-CR-N-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RIDER JACKSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(Filed OCTOBER 18, 2004)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

In an interlocutory appeal, Michael Rider Jackson appeals the district court's denial of his motion to dismiss on the grounds of double jeopardy and collateral estoppel. The district court did not err in denying his motion to dismiss. We affirm.

I. BACKGROUND

On January 17, 2002, the Bureau of Alcohol, Tobacco, Firearms and Explosives executed a warrant on Jackson's residence and seized 25 firearms from a gun safe located in Jackson's bedroom. The firearms included handguns made by AMT and Ruger. At the time of the seizure, keys to the safe were found in Jackson's pants pocket, but Jackson's wife claimed ownership of the guns. In 2002, the Government indicted Jackson for possession of 25 firearms by a convicted felon (including the Ruger, but excluding the AMT) on January 17, 2002, in violation of 18 U.S.C. § 922(g). Pursuant to a stipulation with Jackson, the Government later redacted the indictment to include only 5 firearms, excluding both the Ruger and the AMT (the 2002 Indictment). At trial, Jackson contended the guns belonged to his wife, and he never possessed them. A jury acquitted Jackson of the charge pursuant to a general verdict form.

In 2003, the Government indicted Jackson for possessing the AMT and the Ruger on, about, or between February 2001 and April 9, 2001 (the 2003 Indictment). Jackson moved to dismiss the indictment on the grounds of double jeopardy and collateral estoppel. The Government argued the 2003 Indictment was not subject to dismissal because Jackson's possession of the firearms was a separate offense and was interrupted by his wife's possession. The district court denied Jackson's motion to dismiss.

On appeal, Jackson contends his 2003 Indictment is barred by double jeopardy. He argues, with regards to the AMT firearm, that it was one of the firearms seized and examined for an interstate nexus prior to the first trial, and that the Government should not be able to abuse the

system by continuously charging him based on different dates until it obtains a conviction. Additionally, Jackson argues had he been found guilty at the first trial, every firearm seized would have been considered in his sentencing, so therefore, the second indictment violates the Double Jeopardy Clause. With regards to the Ruger firearm, Jackson argues he will have to admit having committed a violation of 18 U.S.C. § 922(g)(1), to which he was found innocent, in order to prove double jeopardy in the successive prosecution. He avers that, during the first trial, the Government argued three types of possession – actual, joint, and constructive – and he was acquitted. Therefore, the possession was not in a different "manner" than was tried in the first case.

Jackson also argues, in the alternative, the Government should be estopped from using the Ruger firearm in the 2003 Indictment since it was one of the firearms the Government alleged was possessed according to the allegations in the 2002 Indictment, and that the Government should be estopped from relitigating the facts regarding the seizure of any of the guns on January 17, 2002. He also contends the Government should likewise be estopped from arguing that Jackson was in possession of the guns prior to January 17, 2002, as the jury resolved that issue by acquitting him.

II. STANDARD OF REVIEW

We review de novo both a district court's ruling on double jeopardy and collateral estoppel. *United States v. Quintero*, 165 F.3d 831, 834 (11th Cir. 1999); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1360 (11th Cir. 1994).

III. DISCUSSION

A. *Double Jeopardy*

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause protects defendants from a second prosecution for the same offense after acquittal. *Jones v. Thomas*, 109 S. Ct. 2522, 2525 (1989).

"When a defendant moves to dismiss an indictment on double jeopardy grounds, he bears the initial burden of establishing a nonfrivolous prima facie claim." *Baptista-Rodriguez*, 17 F.3d at 1360. Generally, a defendant establishes a prima facie case "by resort to the pleadings from the respective prosecutions," although "supplemental factfinding may be necessary." *Id.* Once the defendant establishes a prima facie case, the burden of persuasion shifts to the government to prove by a preponderance of the evidence that no constitutional violation exists. *United States v. Nino*, 967 F.2d 1508, 1510 (11th Cir.1992).

When resolving an issue of alleged successive prosecutions, it is not sufficient to examine the statutory elements of the offense charged. *United States v. Mara*, 983 F.2d 1004, 1011 (11th Cir. 1993). Instead, it must be determined whether "the underlying facts that gave rise to the first prosecution are, or are not the sole basis for the second." *Id.* For pretrial double jeopardy analysis, the district court is permitted to look beyond the indictment to extrinsic evidence, including the government's proffer, to decide whether double jeopardy exists. *Nino*, 967 F.2d at 1511.

Generally, possession of a firearm is a course of conduct that Congress chose to punish as one offense. *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir.

1996). "Where there is no proof that possession of the same weapon is interrupted, the Government may not arbitrarily carve a possession into separate offenses." *Id.* Seizing weapons at one time and in one place does not automatically make all possession of the firearm one offense; it is the character of the possession that matters. *United States v. Bonavia*, 927 F.2d 565, 569 (11th Cir. 1991) (holding "[i]f evidence . . . establishes that defendant . . . separated one of the weapons charged in the indictment and possessed that weapon separately – that is, at a different location – the government may treat that weapon as a separate unit of prosecution, even though that gun was seized at the same time and in the same location as other weapons charged in the indictment"). Criminal conduct that is used for sentence enhancement in an earlier prosecution does not violate the Double Jeopardy Clause. *United States v. Nyhuis*, 8 F.3d 731, 740 (11th Cir. 1993).

Here, the 2002 Indictment was for one count of possession on January 17, 2002, based on 25 firearms found in a safe to which Jackson had a key in his pants pocket. The jury found Jackson not guilty in a general verdict. The Government then attempted, one year later, to charge Jackson again, for two of the same firearms seized in the safe, on a different date before January 17, 2002. The primary issue is whether both indictments can be considered the same offense. *See United States v. Dixon*, 113 S. Ct. 2849, 2856 (1993). Because the two firearms charged in the 2003 Indictment were seized from the safe in the 2002 case, Jackson has established a prima facie case of double jeopardy, so it is the Government's burden to prove

that no constitutional violation exists.[1] *Nino*, 967 F.2d at 1510.

During the trial on the 2002 Indictment case, Jackson asserted to the jury he did not possess the guns in the safe on January 17, 2002. Instead, he contended the guns belonged to his wife. There was evidence at trial that Jackson's wife admitted, when the guns were seized, the guns belonged to her. According to the Government's proffer during oral argument before the district court on the 2003 Indictment, the Government intends to show at the second trial that Jackson actually held the AMT and the Ruger in his hands on, about, or between February 2001, and April 9, 2001. Because the possession of these guns by Jackson's wife in January 2002 would interrupt any possession by Jackson in February to April 2001, the Government is not attempting to arbitrarily carve the possession into separate offenses. *See Rivera*, 77 F.3d at 1351. Jackson's actual possession of holding and firing the guns in February to April 2001 would be interrupted by Jackson's wife's storage of the guns in her gun safe. Thus, the underlying facts of the 2002 Indictment are not the sole basis for the 2003 Indictment. *See Maza*, 983 F.2d at 1011.

Jackson's contention the firearms seized in the 2002 Indictment could have been used to enhance his sentence, and, thus, the 2003 Indictment is barred by the Double

[1] Although Jackson makes separate double jeopardy arguments regarding the AMT and Ruger firearms in his initial brief, we have combined the analysis for both firearms. Whether or not both guns were listed on the final 2002 Indictment, we are assuming, for purposes of this appeal, the jury acquitted Jackson of possessing either of these guns on January 17, 2002.

Jeopardy Clause, is also without merit since criminal conduct that is used for sentence enhancement in an earlier prosecution does not violate the Clause. *See Nyhuis*, 8 F.3d at 738-39. Therefore, we affirm the district court's finding that the 2003 Indictment does not violate the Double Jeopardy Clause.

B. *Collateral Estoppel*

Under the doctrine of collateral estoppel, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 1194. We have characterized the doctrine as "a narrow exception to the Government's right to prosecute a defendant in separate trials for related conduct," which applies "only where a fact or issue necessarily determined in the defendant's favor in a former trial is an essential element of conviction at the second trial." *United States v. Brown*, 983 F.2d 201, 202 (11th Cir. 1993). The burden is on the defendant to show "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling v. United States*, 110 S. Ct. 668, 673 (1990).

To determine whether collateral estoppel applies in the context of a retrial, courts engage in a two-part inquiry. *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996). "First, the court must decide whether it can ascertain the basis of the acquittal at the first trial." *Brown*, 983 F.2d at 202. In making this determination, the courts must ascertain whether "the jury's verdict of acquittal was based upon reasonable doubt about a single element of the crime which the court can identify." *Id.* Second, the court must decide whether facts which

constituted essential elements of the acquitted count are essential elements of the offense with which the defendant is charged in the subsequent proceeding. *Shenberg*, 89 F.3d at 1479. This identity of overlapping elements extends beyond legal definitions of the elements and requires a "factual identity of issues to such an extent that a jury rationally could not have a reasonable doubt" about the element in the first trial without also having a reasonable doubt about the same element in the second trial. *Brown*, 983 F.2d at 204. Thus, this second prong is satisfied only where the subsequent verdict of conviction is "rationally inconsistent with the prior verdict of acquittal." *Id.* "[T]he defendant bears the burden of proving, by convincing and competent evidence that the fact sought to be foreclosed was necessarily determined against the government in the prior trial." *United States v. Boldin*, 818 F.2d 771, 775 (11th Cir. 1987).

Because the jury for the 2002 Indictment used a general verdict form, it is difficult to ascertain exactly what the jury found at trial. However, the defendant has not proved by convincing and competent evidence that the Government is planning to relitigate anything the jury already found. First, the trial on the 2002 Indictment concerned whether Jackson possessed the firearms because he had in his possession the key to the gun safe on January 17, 2002.[2] In the 2003 indictment, the Government is alleging actual physical possession and firing of

[2] Even assuming, as Jackson argues, that the Government tried to trove actual possession of the guns in the trial on the 2002 Indictment, the physical possession and firing of the two weapons on, about, or between February 2001 and April 9, 2001 is a proven by a different set of facts.

two of the weapons on, about, or between February 2001, and April 9, 2001. Therefore, a subsequent verdict of conviction will not be "rationally inconsistent with the prior verdict of acquittal." *Brown*, 983 F.2d at 204. Thus, we affirm the district court's finding that the 2003 Indictment is not barred by collateral estoppel.

IV. CONCLUSION

The district court did not err in denying Jackson's motion to dismiss. The 2003 Indictment does not violate the Double Jeopardy Clause and is not barred by collateral estoppel.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR. NO. 03-129-N
MICHAEL RIDER JACKSON,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Jan. 27, 2004)

I. INTRODUCTION

This cause is before the court on an Objection to a Recommendation of the Magistrate Judge filed by the Defendant Michael Rider Jackson ("Jackson").

The facts of this case are that in 2002, Jackson was charged with, and acquitted of, a single charge of being a felon in possession of firearms. The original indictment in that case included 25 weapons, but had been redacted, and only five weapons were presented to the jury. After Jackson's acquittal, Jackson was indicted for possession of two weapons, one of which, a Ruger .44 magnum (hereinafter "Ruger firearm"), was in the original, but not redacted, indictment in the first case. The other weapon, an Arcadia Machine and Tool .22 caliber pistol (hereinafter "AMT firearm"), was not in either indictment in the earlier case, but was mentioned in an expert report that was not admitted into evidence at that trial. The Government has represented that this indictment was based on testimony of actual possession of these weapons which was not known to the Government at the time of the first case.

The Magistrate Judge has recommended that the Defendant's Motion to Dismiss the Indictment be denied. Upon consideration of the submissions of the parties, including oral argument, and upon de nova review of the Magistrate Judge's Recommendation, for the reasons to be discussed, the court finds that this Recommendation is due to be ADOPTED with modification, except as to the Recommendation's finding that the Motion to Dismiss was untimely.

II. STANDARD OF REVIEW

A district court may refer motions to dismiss an indictment to a United States Magistrate Judge for a recommendation. 28 U.S.C. § 636(b)(1)(B). The district judge must conduct a de novo review of the portions of the Magistrate Judge's recommendation to which a party has objected. *Id.*

III. DISCUSSION

The Defendant challenges the Magistrate Judge's Recommendation that the Motion to Dismiss be denied as untimely, and substantively, that there is no bar to prosecution of this case under the doctrines of Double Jeopardy or collateral estoppel.

A. Timeliness

The court departs from Magistrate Judge's conclusion that the Motion to Dismiss is due to be denied as untimely. On July 10, 2003, the deadline for filing pretrial motions in this case, Jackson filed a motion to extend the time for filing pretrial motions. The Magistrate Judge entered an

order on August 5, 2003, giving Jackson until August 7, 2003 to move to file additional pretrial motions. Jackson filed a Petition to File Out of Time Motion on August 14, 2003. Given the serious and complex nature of the constitutional issues raised and the time constraints under which counsel for Jackson was working, the court will allow the late-filed Motion on the basis of excusable neglect and consider the motion on the merits, with the admonition to counsel to carefully calendar and observe all deadlines in the future.

B. Double Jeopardy

The Double Jeopardy Clause of the United States Constitution provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. *U.S. Const.* amend. V. It prohibits successive prosecution for the same offense after acquittal, successive prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In this case, the Defendant contends that he has been successively prosecuted after an acquittal.

For purposes of resolving an issue of alleged successive prosecutions, whether a defendant is being put in jeopardy for the same offense does not depend only on the statutory elements of the offenses charged. *United States v. Maza*, 983 F.2d 1004, 1011 (11th Cir. 1993). Instead, there must be some determination "that the underlying facts that gave rise to the first prosecution are, or are not the sole basis for the second." *Id.* To decide whether the double jeopardy bar applies, a court balances "two weighty interests: the defendant's interest in repose and society's

interest in the orderly administration of justice." *Lockhart v. Nelson*, 488 U.S. 33, 48 (1988) (Marshall, J. dissenting).

In the single count charged in the indictment in this case, there are two weapons referred to, one of which was part of a single count indictment brought against Jackson in an earlier case, and one of which was not part of that indictment. The court will address the bar against successive prosecutions with respect to each of these weapons.

1. The AMT Firearm

Although the parties did not originally note this point, there now appears to be no dispute with the Magistrate Judge's finding that the AMT firearm was not included in the original, or the redacted, indictment in the first trial.

The Defendant, however, has objected to the Magistrate Judge's conclusion that merely because the AMT was not included in any indictment in the first trial, there can be no double jeopardy. The basis of the Defendant's argument is that the AMT was included in the interstate nexus expert report, and that the AMT firearm was part of the case, having been seized during the execution of the search warrant at the same time as the weapons which were listed in the indictment.

The court cannot agree with the Defendant's argument. The expert report referred to was not put into evidence in the first trial. The nexus with interstate commerce was stipulated to by the parties as to the five guns which were included in the redacted indictment. The court has reviewed the transcript of the trial on the January 17 possession charge. Although there were references by the Government to the fact that there were

multiple guns in addition to the five in the redacted indictment, there was no testimony specifically about the AMT firearm at issue in this case. Accordingly, the court concludes that the Objection to the Magistrate Judge's Recommendation is due to be OVERRULED and that the Recommendation will be adopted as to the conclusion that the Defendant was not placed in jeopardy with regard to the AMT firearm in the first trial.[1]

2. The Ruger Firearm

In her Recommendation that the Motion to Dismiss also be denied as to the Ruger firearm, the Magistrate Judge relied in part upon *United States v. Rivera*, 77 F.3d 1348 (11th Cir. 1996). In *Rivera*, a jury returned a verdict of not guilty as to one date upon which a weapon was possessed, but deadlocked as to the second date. The defendant moved to dismiss the indictment on double jeopardy grounds. On appeal, the court of appeals reasoned that the not guilty finding as to one date of possession did not constitute an acquittal of the possession charge as a whole, since proof of possession on either date could support a conviction for the offense. *Id.* at 1351. A retrial as to the second date of possession also did not violate the Double Jeopardy Clause because jeopardy did not terminate when the court declared a mistrial. *Id.* at 1351-52.

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[1] While not necessary to the court's opinion, the court notes that at oral argument on the Motion the Assistant United States Attorney stated that the omission of the AMT firearm from the original indictment in the first case was intentional and was based on the fact that the evidence of possession as to the other firearms, found in two gun safes, did not apply to the AMT firearm.

The court recognizes that the instant case is different from *Rivera* in several ways. One of distinctions between this case and *Rivera* is that the there is no dispute that the jury acquitted Jackson as to five weapons in the earlier case, but the other 20 weapons were not presented to the jury. The Magistrate Judge concluded that jeopardy did not terminate as to the 20 weapons which were not presented to the jury. *See e.g., Maula v. Freckleton*, 972 F.2d 27 (2d Cir. 1992) (stating that nonsubmission of charges to a jury did not terminate jeopardy because, under state law, nonsubmission of the charges was not an acquittal).

The facts as presented in the oral argument on the Defendant's Objections to the Magistrate Judge's Recommendation, however, were different from the impression conveyed in the Government's opposition to the Motion to Dismiss. At oral argument, the attorney for the Government stated that during the trial of Jackson on the January 17 possession charge, the Government lacked proof of the interstate nexus of 20 of the 25 firearms charged in the indictment and so only attempted to get a verdict on the five weapons included in the redacted indictment. Counsel for the Government stated that because the Government lacked proof of an essential element of the charge, ie., interstate nexus, as to 20 of the weapons, it was faced with a choice between seeking a continuance to provide discovery on the interstate nexus requirement of the remaining 20 weapons or proceeding only on the five for which it had evidence of the nexus to interstate commerce. Jackson, on the other hand, has stated that the understanding was that the Government would only prove interstate nexus as to five weapons, but a verdict as to those 5 would apply to the other 20.

The conference during which the redaction of the indictment was discussed in the previous case was not put on the record. Therefore, this court has only the attorneys' representations as to what they intended by redacting the indictment. If the court were to accept the Government's version of the facts, it may be that there is no double jeopardy because the Government's redaction of the remaining 20 weapons appears from the minutes of the previous trial to have occurred before the jury was sworn in that case. *See United States v. Jackson*, CR 92-95-N (Doc. #76). Jeopardy attaches when a jury is empaneled and sworn. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). The court does not have definitive evidence as to the time line of when the redaction occurred, however. Because accepting the Government's version of the facts would effectively negate the Double Jeopardy defense in this case based merely on an assertion, the court instead will accept Jackson's version of the events, and consider all 25 firearms to have remained in the case, and to have been covered by the jury's acquittal of Jackson, despite the redaction.[2]

The court now turns to the issue of whether the indictment in this case has placed Jackson in jeopardy twice by charging him with possession of the Ruger firearm in a different manner and on different dates prior to January 17.

Jackson has argued that there is no difference between this case and *Ex parte Nielsen*, 131 U.S. 176 (1889), or *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990). Both

[2] The Government has not argued that jeopardy did not attach in the previous case.

Ex parte Nielsen and *Mars* are distinguishable from the instant case, however. In *Ex parte Nielsen*, a writ of habeas corpus was due to have been granted where the petitioner had pleaded guilty to the offense of cohabitation with more than one woman, and had also been convicted of adultery with one of the women during the period of time covered by the cohabitation. *Ex parte Nielsen*, 131 U.S. at 191. In *Mars*, the defendant was charged with killing the same person on two different dates. *Mars*, 895 F.2d at 1350. These cases did not involve firearm possession offenses. Ex *parte Nielsen* involved a cohabitation offense which itself was necessarily continuous, and *Mars* involved offenses which were mutually exclusive.

The significance of the fact that the offense charged in this case is a firearm possession offense is explained in *Rivera*. As explained in *Rivera*, gun possession generally is a continuous offense which cannot be arbitrarily carved into separate offenses. *See Rivera*, 77 F.3d at 1351. Separate prosecution can occur, however, where possession of the same weapon is interrupted. *Id.* In *Rivera*, the Eleventh Circuit cited with approval a Sixth Circuit case for the proposition that "[p]ossession 'is a course of conduct; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm.'" *See id.* (quoting *United States v. Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976)).

This case, of course, presents a different situation from *Rivera* in that the new indictment charges new dates of possession that were not present in the single count indictment in the first case. The indictment in this case is also distinct from that in *Rivera*, and more clearly outside of the scope of the Double Jeopardy clause, because it

charges possession in a completely different manner. The court does not agree with Jackson's characterization of the Magistrate Judge's analysis as depending solely on the dates alleged. In the instant case, Jackson is not alleged to have possessed the gun in a safe, as he was in the previous case, but to have actually physically held and used the Ruger firearm.

The Government represented at the oral argument held on the Objections to the Magistrate Judge's Recommendation that its theory at trial will be that Jackson actually possessed the Ruger firearm, and fired it, on several occasions, but that on January 17, as the jury found, others in his household, rather than Jackson, possessed the Ruger firearm. Looking only at the conduct with which he has been charged in the two cases, however, the court agrees with the Recommendation of the Magistrate Judge that the charged possessions are sufficiently distinct to be separately prosecuted without violating the Double Jeopardy Clause.[3]

In *United States v. Bonavia*, 927 F.2d 565 (11th Cir. 1991), a defendant was charged with four counts of being a felon in possession of a weapon. The facts were that on a day in May 1985, four weapons were seized from the defendant's office. There was also testimony by a witness, however, who stated that when he had visited the defendant at his home, he had observed the defendant with a firearm, and that they had fired the firearm over a nearby lake. *Id.* at

[3] Because under this court's analysis there would be no double jeopardy whether the court accepts the facts as found by the jury for purposes of double jeopardy analysis, or the facts as alleged in the previous indictment, the court need not resolve which factual basis is appropriate for double jeopardy analysis.

567-68. The Eleventh Circuit concluded that the count charging possessing of the firearm testified to as having been possessed by the defendant and fired over a lake was not multiplicitous. *Id.* at 569. The Eleventh Circuit held specifically that

> if evidence presented at trial establishes that defendant, at some point in the period covered by the indictment, separated one of the weapons charged in the indictment and possessed that weapon separately – that is, at a different location – the government may treat that weapon as a separate unit of prosecution, even though the gun was seized at the same time and in the same location as the other weapons charged in the indictment and had been received by defendant at the same time as the other weapons.

Id. Although *Bonavia* involved separate counts in the same indictment, the court is guided by that analysis in this case. To conclude that this case is barred by double jeopardy would mean that Jackson is insulated from prosecution for any pre-January 17 actual use of the Ruger firearm merely because he was charged with, and acquitted, of possession of that firearm in a safe. This court concludes that the indictment in this case alleges a different type of possession than the constructive possession of the Ruger firearm in the safe in Jackson's home and, therefore, does not violate the Double Jeopardy Clause.

C. Collateral Estoppel

Collateral estoppel will bar prosecution if a fact necessarily determined in a former trial is an essential element of a conviction. *Rivera*, 77 F.3d at 1352.

In his objections to the Recommendation of the Magistrate Judge as to the conclusion that there is no collateral estoppel in this case, Jackson only discusses the Ruger firearm and says that it should have been considered as having been presented to the jury because it was in the original indictment. He does not object to the discussion in the Recommendation of collateral estoppel relevant to the AMT firearm. The Recommendation that the Motion to Dismiss be denied on collateral estoppel grounds as to the AMT firearm, therefore, is due to be adopted.

As to the Ruger firearm, the court agrees with the analysis that the possession alleged is on a different date and in a different manner, and does not seek to hold Jackson criminally responsible based on any fact found in his favor in the first trial. *See Rivera*, 77 F.3d at 1352 (holding that a finding of not guilty as to possession of the firearm on one date was not inconsistent with a finding of guilt of possession on another date). Therefore, the court will adopt the recommendation that the Motion to Dismiss on collateral estoppel grounds be denied.

IV. CONCLUSION

For the reasons discussed, the court concludes that the Recommendation of the Magistrate Judge is due to be adopted in part and rejected as to the timeliness argument advanced by the Government. Accordingly, it is hereby ORDERED as follows:

1. The Magistrate Judge's Recommendation that the Defendant's Motion to Dismiss is untimely is REJECTED, and the Objection to that aspect of the Recommendation is SUSTAINED.

2. The Magistrate Judge's Recommendation that the Defendant's Motion to Dismiss be DENIED on substantive grounds is ADOPTED with modification, as discussed above, and the Objections to that aspect of the Recommendation are OVERRULED.

3. The Motion to Dismiss is DENIED.

Done this 27th day of January, 2004.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	CR. NO. 03-129-N
MICHAEL RIDER JACKSON,	)	
	)	
Defendant.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

(Filed Dec. 3, 2003)

The case is before the court on defendant Michael Rider Jackson's motion to dismiss the indictment (doc. # 23). The government has responded to the motion (doc. # 30) and the defendant filed a reply (doc. #32). For the reasons set out below, the motion to dismiss is due to be denied.[1]

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[1] This recommendation sets out the substantive reasons why the motion to dismiss is without merit. The motion is also due to be denied as untimely. The original deadline for filing pretrial motions in this case was July 10, 2003, two days before the pretrial conference. On July 10, defendant filed a motion requesting, *inter alia*, that the time for filing pretrial motions be extended. Doc. # 9. The court declined to grant a general continuance of the motion deadline; instead, it ordered that "[d]efendant may move for leave to file any additional pretrial motions, specifically showing good cause for the late filing and attaching the proposed motion, on or before August 7, 2003." Doc. # 21. Defendant's motion for leave to file an out of time motion to dismiss was filed a week after this deadline, on August 14, 2003. Doc. # 23. The motion does not show good cause and excusable neglect for defendant's failure to seek an extension of the August 7 deadline prior to its expiration. Fed. R. Crim. P. 45(b)(1)(B).

Discussion

Defendant Jackson was previously indicted in this court on June 27, 2002, on one count of violating 18 U.S.C. §922(g)(1). *See* Cr. No. 02-95-N. That indictment (hereinafter, the "2002 indictment") charged that on or about January 17, 2002, Jackson, having been convicted of rape, a felony, in the Circuit Court of Mobile County on November 9, 1979, unlawfully possessed in Butler County some 25 listed rifles, revolvers and shotguns, as well as multiple rounds of ammunition. Prior to trial, the defendant and the government stipulated to the interstate nexus requirement for only five of the firearms,[2] and agreed to redact the indictment to eliminate all reference to the other firearms and ammunition charged and to eliminate any reference to the type of felony for which Jackson was convicted. *See* Doc. # 67 (redacted indictment filed December 9, 2002). Jackson was tried before the Honorable Truman Hobbs on the charge of possessing the five firearms listed in the redacted 2002 indictment, and was acquitted by the jury on December 10, 2002. *See* Tr. at 87-88, 124.

On June 10, 2003, Jackson was indicted again in the instant case. The second indictment (hereinafter, the "2003 indictment") charges that between February 2001 and April 9, 2001, Jackson, having been convicted of rape in the Circuit Court of Mobile County on November 9, 1979, unlawfully possessed in Butler County and Lowndes County two firearms – an Arcadia Machine and Tool

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[2] Those firearms were: a Smith & Wesson Model 39-2 pistol (#A148786), a Davis Industries D-32 derringer (#099712), a North China Industries SKS rifle (#9131562), a Colt Commander revolver (#38676), and a North China Industries .762 caliber rifle (#19000455).

(AMT) .22 caliber pistol, and a Ruger .44 magnum revolver[3] – in violation of 18 U.S.C. §922(g)(1).

Double Jeopardy

Jackson contends that the 2003 indictment should be dismissed on the grounds that trial of defendant on the charge contained in this indictment would violate the Double Jeopardy Clause of the United States Constitution, as well as the doctrines of *res judicata* and collateral estoppel.[4] He argues that the firearms in the 2003 indictment are the same firearms, and the charge is the same charge, for which defendant stood trial and was acquitted in December 2002.

The government denies that the 2003 indictment raises any double jeopardy concern. It represents in its response to defendant's motion that the 2003 indictment

> charges the Defendant for committing the same crime [as the 2002 indictment], but on another occasion. It is based upon completely different evidence than the first indictment, and completely

[3] The parties appear to agree that the AMT pistol (#H31793) and the Ruger revolver (#80-12015) were originally listed in the 2002 indictment prior to its redaction. They are correct with regard to the Ruger revolver, but the AMT pistol with the serial number listed above was *not* in fact listed in the 2002 indictment. Neither firearm was listed in the redacted 2002 indictment.

[4] To the extent that defendant maintains that certain evidence, including testimony, should be excluded from the trial on the 2003 indictment based on grounds of double jeopardy, *res judicata*, or collateral estoppel – rather than that the indictment should be dismissed on those grounds – he must address his arguments to the district judge by means of a motion *in limine* or objection to admission of the specific evidence he seeks to exclude.

> different evidence than that presented at Defendant's previous trial. The second indictment is founded upon eyewitness testimony that Defendant was observed in possession of the two specified firearms on occasions between about February 1, 2001 and April 9, 2001, in Lowndes and Butler Counties. Although the United States contemplates that the Defendant's brother, Charles Jackson, will be a witness at trial, he is expected to testify as to Defendant's possession of the identified weapons between February 1, 2001 and April 9, 2001. No testimony or other evidence in this regard was elicited at Defendant's December 2002 trial.

Response at 5. The government further contends that "the evidence will show that the firearms charged in the June 10, 2003, indictment were owned and maintained by Defendant's wife, but that on occasions between February 1 and April 9, 2001, Defendant took possession of them [by holding and/or shooting them] in violation of 18 U.S.C. §922(g)(1)." *Id.* at 8.

The Double Jeopardy Clause of the fifth amendment to the United States Constitution provides that "no person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause prohibits "a second prosecution for the same offense after an acquittal; a second prosecution for the same offense after a conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). "In both the multiple punishment and multiple prosecution contexts," the Supreme Court "has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *United*

States v. Dixon, 509 U.S. 688, 696 (1993). "The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution." *Id.*

In the instant case, if the court applied the *Blockburger* "same elements" test strictly, it could conclude that the 2003 indictment charges the same offense as that charged by the 2002 indictment because the same statutory elements must be proved for each charge. The elements of offenses charged under 18 U.S.C. § 922(g)(1) "require proof beyond a reasonable doubt that [the] defendant was a convicted felon, that he possessed a firearm in or affecting interstate commerce, and that he knew he possessed the firearm." *United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991). Even though the dates of the offenses and the firearms alleged differ in the redacted 2002 indictment and the 2003 indictment, specific dates of possession and specific weapons are not material elements that must be proved for a firearms possession charge under 18 U.S.C. § 922(g)(1). *See United States v. Smith*, 2001 WL 1631432, *3 (6th Cir. 2001) (unpublished) (type of firearm possessed); *United States v. Stuckey*, 220 F.3d 976, 982 (8th Cir. 2000) (date of possession).

However, the Eleventh Circuit has cautioned against so strict an application of *Blockburger*. As the Court pointed out, "[r]ead literally, the *Blockburger* rule might be taken to forbid a second prosecution involving a violation of exactly the same law – for example a charge of robbery – notwithstanding that it was based on a different robbery. Clearly, that is neither the result the Court intended nor the meaning of the Double Jeopardy Clause. Double

jeopardy was not meant to immunize a defendant from prosecution if he violates the same law again." *United States v. Maza*, 983 F.2d 1004, 1011 (11th Cir. 1993). The Eleventh Circuit pointed out that the *Blockburger* Court itself acknowledged that a defendant can be separately punished for each individual transgression of the same statute, each constituting a separate offense. *Id.* at 1011 n. 14. As the Court of Appeals explained:

> Although on their face the[ ] words [of the Double Jeopardy clause] seem to state an easily understood concept, in practice, defining the scope of their protection has been fraught with difficulties – none more so than the words "same offence." One thing is clear. Whatever else these words may proscribe, they surely were not intended to suggest that a person could not be "twice put in jeopardy" for the "same offence" if he commits the same offense twice. Whether a defendant has committed the same offense twice is a factual question. Therefore, for purposes of successive prosecutions, the question of whether a defendant is being put in jeopardy for the "same offence" cannot be determined solely with reference to the statutory elements of the offenses charged. Rather, there must also be some determination that the underlying facts that gave rise to the first prosecution are, or are not the sole basis for the second.

Id. at 1010-1011.

The Eleventh Circuit has further addressed the question of how a court should determine whether a defendant is being put in jeopardy twice for the same offence in the specific context of 18 U.S.C. § 922(g)(1), in which the charge concerns the possession of a firearm. The

Court held that "generally, possession 'is a course of conduct; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm.'" *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir. 1996) (citation omitted). Where the question before the court is whether successive §922(g)(1) prosecutions for *two different firearms* charge a defendant with the "same offense" for double jeopardy purposes, the court must recognize that "the simultaneous, undifferentiated possession of multiple firearms constitutes only one offense" under the statute. *United States v. Bonavia*, 927 F.2d 565, 568 (11th Cir. 1991) (citation and internal quotation marks omitted) (addressing 18 U.S.C.App. § 1202(a), the predecessor to §922(g)(1)). The general rule is that only one offense should be charged "regardless of the number of firearms involved, absent a showing that the firearms were stored or acquired at different times or places." *Id.* (citation omitted). The felon in possession statute "allows the government to treat each of several firearms not simultaneously received or possessed as separate units of prosecution." *Id.* at 568-69 (citation omitted). "The government can prove separate receipts by establishing that 'the weapons were acquired at different times or places'; separate possessions can be established 'by showing either that the weapons were stored in different places or that the weapons were acquired at different times or places.'" *Id.* at 569 (citation omitted).

Where the question before the court is whether successive §922(g)(1) prosecutions for the *same firearm on different dates* charges a defendant with the "same offense" for double jeopardy purposes, a similar rule applies. "Where there is no proof that possession of the same

weapon is interrupted, the Government may not arbitrarily carve a possession into separate offenses." *Rivera*, 77 F. 3d at 1351. "[A] felon may be charged and convicted of two counts of possessing the same firearm only if: (1) he possesses the weapon; (2) he is aware that his possession of the weapon has been interrupted; and (3) he thereafter reacquires possession of the weapon himself." *United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002). "Put another way, the Government may charge and convict an individual of multiple violations of §922(g)(1) only if 'it can produce evidence demonstrating that the firearms were stored or acquired separately and at different times or places.'" *Id.* (citation omitted).

In the 2003 indictment, defendant is charged with possessing one firearm – that is, the AMT pistol (#H31793) – that was not listed in the 2002 indictment, either before or after redaction. The dates of possession charged in the 2003 indictment (that is, between February 2001 and April 9, 2001) are not the same as those charged in the 2002 indictment (that is, on or about January 17, 2002). Thus, on its face, the 2003 indictment appears to charge a different offense with regard to the AMT pistol from that charged in the 2002 indictment. Defendant does not claim that the AMT pistol possession should have been charged, if at all, with the other firearms listed in the 2002 indictment as part of a simultaneous, undifferentiated possession of multiple firearms that would constitute only one offense. Further, the government's theory in this case is that the weapons in the 2002 and 2003 indictments were possessed not only at different times but by different means. The government's prosecution of the possession charge in the 2003 indictment hinges on its expected proof that defendant's wife owned and maintained the firearms

at issue, but that defendant took possession of them by holding and firing them on occasions between February 1 and April 9, 2001. In contrast, the government's theory in the 2002 prosecution – which the jury rejected – was that defendant possessed the firearms listed in the indictment on or about January 17, 2002, by possessing the key to the gun safe in which the weapons were stored. Accordingly, the court concludes that, with regard to the AMT pistol, the 2003 indictment does not charge the same offense as that for which defendant was acquitted in the 2002 indictment.

The court's analysis is, in general, the same for the Ruger revolver (#80-12015) charged in the 2003 indictment. However, since this revolver was originally included in the initial 2002 indictment – though not in the redacted version that actually went to the jury[5] – the court must consider whether the charge concerning the Ruger constitutes a successive §922(g)(1) prosecution for the same

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[5] The protection of the Double Jeopardy Clause does not extend to the defendant's possession of the firearms redacted from the 2002 indictment just because they were originally listed in that indictment. Jeopardy attached on the original indictment when the jury was empaneled and sworn, but "[t]he protection of the Double Jeopardy Clause 'applies only if there has been some event, such as an acquittal, which terminates the original jeopardy.'" *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir. 1996) (citation omitted). Defendant was not acquitted of charges relating to the redacted weapons because those charges did not go to the jury. *See* Doc. # 76 (Clerk's Minutes) (Noting that the jury was given a copy of the redacted indictment, rather than the original indictment, during its deliberations); *see also United States v. Duso*, 1993 WL 131940, *5 (6th Cir. 1993) (unpublished). Thus, the original jeopardy was not terminated with regard to these weapons. However, if any of the redacted firearms is charged again in a successive prosecution, possession of those firearms must have been interrupted because, as noted above, the government may not arbitrarily carve a possession into separate offenses. *Riviera*, 77 F. 3d at 1351.

firearm on different dates that represents an impermissible attempt to carve a single possession into separate offenses. By listing the Ruger among the firearms charged in the 2002 indictment, the government implicitly contended that this revolver was part of defendant's possession "on or about January 17, 2002" of multiple firearms that constituted a single violation of §922(g)(1). Defendant cannot be charged again with possession of this weapon unless his possession of the same weapon was interrupted or otherwise differentiated from the possession originally charged in the 2002 indictment. Here, the government contends that defendant's acquisition of the Ruger between February 2001 and April 9, 2001 – by holding and/or firing the revolver during that period in Butler and Lowndes County – was separate and distinct from his alleged possession of the same weapon by possessing the key to the gun safe in the pocket of a pair of his pants found when his house in Butler County was searched pursuant to a warrant on or about January 17, 2002. Under § 922(g)(1), a convicted felon may be punished for each transaction or acquisition by which he attempts to arm himself unlawfully. *United States v. Buchmeier*, 255 F.3d 415, 423 (7th Cir. 2001). The court agrees that, in the instant case, the government does not seek to try the defendant twice for the same act, but instead desires to try him twice because he has allegedly committed two crimes involving two distinct courses of conduct. *See Maza*, 983 F.2d at 1014. Accordingly, the instant prosecution does not violate the Double Jeopardy Clause.

Collateral Estoppel[6]

Collateral estoppel also does not bar a second prosecution in this case. "Collateral estoppel will completely bar prosecution 'if a fact necessarily determined in a former trial is an essential element of a conviction.'" *Rivera*, 77 F.3d at 1352 (citation omitted). "The 'finding of fact must be inconsistent with a finding of guilt in a second trial." *Id.* (citation omitted). Clearly, no collateral estoppel issue is raised by the 2003 indictment relating to the AMT pistol. The jury made no finding of fact regarding the AMT pistol in defendant's trial on the 2002 indictment since the pistol was not listed in that indictment. Indeed, since defendant's allegedly unlawful possession of the Ruger revolver did not go to the jury at that trial because the indictment was redacted, technically there was no finding of fact as to that firearm either. However, even if such a finding were inferred, it is clear that proof of defendant's possessing the Ruger revolver on or about January 17, 2002 in Butler County by carrying a key to a gun safe in which it was stored is not a required element of a conviction supported by defendant's possessing the same weapon between February 2001 and April 9, 2001 by holding and/or firing the revolver during that period in Butler and Lowndes County. Nor is a finding of not guilty for the possession charged in the 2002 indictment inconsistent with a finding of guilt for the possession charged in the 2003 indictment, since the indictments allege distinct and separate offenses. Therefore, collateral estoppel does not bar a second trial relating to the Ruger revolver or the AMT pistol.

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[6] Despite the title of his motion, defendant offers no *res judicata* argument that is independent of his collateral estoppel claim.

Conclusion

For the foregoing reasons, it is the RECOMMENDATION of the Magistrate Judge that defendant's motion to dismiss be DENIED.

DONE this 3rd day of December, 2003.

/s/ [Illegible]
SUSAN RUSS WALKER
UNITED STATES
MAGISTRATE JUDGE

CR. NO. 03-129-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of thirteen days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v.*

Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc)*, adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 3rd day of December, 2003.

/s/ [Illegible]
SUSAN RUSS WALKER
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10525-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL RIDER JACKSON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___ F.2d___).

(Filed Feb. 4, 2005)

Before: BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35. Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	) CR. No. 02-95-N
	) [18 USC 922 (g)(1)]
v.	) INDICTMENT
MICHAEL RIDER JACKSON	) (Filed Jun 27, 2002)

The Grand Jury charges:

COUNT 1

On or about the 17th day of January, 2002, in Butler County, within the Middle District of Alabama,

MICHAEL RIDER JACKSON,

defendant herein, having been convicted on or about November 9, 1979, in the Circuit Court of Mobile County, Alabama, under Case Number CC79-938, of Rape, a crime punishable by imprisonment for a term exceeding one year under the laws of the State of Alabama, knowingly did possess, in and affecting commerce, firearms and ammunition, that is:

1 – Smith & Wesson Model 39-2 Pistol, SN: A148786

1 – Colt Model Automag II Pistol, SN: H31789

20 – MNF Speer 9MM Rounds

16 – MNF Winchester-Western .30-06 Caliber Rounds

1 – Davis Industries D-32 Derringer, SN: 099712

1 – Remington Arms Co. .22 Caliber Rifle, SN: A2146668

1 _ North China Industries SKS Rifle, SN: 9131562

1 – Winchester 62A, .22 Caliber Rifle, SN: 229837

1 – Ruger Super Blackhawk Revolver, SN: 80-12015 & Six(6) .44 Caliber Rounds

1 – Colt Commander Revolver, .38 Caliber, SN: 38676

1 – Winchester 200 Shotgun, 12 Gauge SN: 26760

1 – U.S.A. Military Surplus M1-30 Rifle, SN: 4824458

1 – North China Industries Rifle, .762 Caliber, SN: 19000455

1 – Remington Arms Co. Shotgun, 12 gauge, SN: 209975

1 – Ruger Blackhawk Revolver, .357 Caliber, SN: 55796

13 – .45 Caliber, Winchester-Western Rounds

29 – 9MM, Winchester-Western Rounds

7 – Assorted Rounds of Ammunition(1-12 gauge; 5-9MM; 1-.357MM)

1 – Pistol Frame Marked National Guerre Herstal Belique, w/mag., SN: None

1 – Winchester Model 94, .30-30, Caliber Rifle, SN: 2344417

1 – Great Wester Arms Corp. .45 Colt Revolver, SN: GW10555

3 – .45 Caliber Rounds

1 – United States Arms .38 Caliber Derringer, SN: 364

39 – Assorted Caliber Rounds of Ammunition

18 – .300 Caliber Rounds of Ammunition

37 _ .32 Caliber) Rounds of Ammunition

20 – 12 Gauge Rounds pf Ammunition

158 – .22 Caliber Rounds of Ammunition

1 – Savage .30-06 Caliber Rifle, SN: F229050

1 – Remington Arms Co. .22 Caliber Rifle, SN: A1793556

1 – Weatherby Vanguard .300 Caliber Rifle, SN: Y212689

1 – 20 Gauge Shotgun SN: None

1 – TRW, Inc. 12 Gauge Shotgun, SN: 6807

1 – Winchester 16 Gauge Shotgun, SN: None

1 – Remington Arms Co. .22 Caliber Rifle, SN: None

1 – Remington Arms Co. Model Speedmaster 522, .22 Caliber Rifle, SN: 1826333,

in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATION

A. Count 1 of this indictment is hereby repeated and incorporated herein by reference.

B. Upon conviction for the violation of Title 18, United States Code, Section 922(g)(1), as alleged in Count 1 of this indictment, the defendant,

MICHAEL RIDER JACKSON,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924 and Section 2461(c), all

firearms and ammunition involved in the commission of this offense, including but not limited to the following:

1 – Smith & Wesson Model 39-2 Pistol, SN: A148786

1 – Colt Model Automag II Pistol, SN: H31789

20 – MNF Speer 9MM Rounds

16 – MNF Winchester-Western .30-06 Caliber Rounds

1 – Davis Industries D-32 Derringer, SN: 099712

1 – Remington Arms Co. .22 Caliber Rifle, SN: A2146668

1 – North China Industries SKS Rifle, SN: 9131562

1 – Winchester 62A, .22 Caliber Rifle, SN: 229837

1 – Ruger Super Blackhawk Revolver, SN: 80-12015 & Six(6) .44 Caliber Rounds

1 – Colt Commander Revolver, .38 Caliber, SN: 38676

1 – Winchester 200 Shotgun, 12 Gauge SN: 26760

1 – U.S.A. Military Surplus M1-30 Rifle, SN: 4824458

1 – North China Industries Rifle, .762 Caliber, SN: 19000455

1 – Remington Arms Co. Shotgun, 12 gauge, SN: 209975

1 – Ruger Blackhawk Revolver, .357 Caliber, SN: 55796

13 – .45 Caliber, Winchester-Western Rounds

29 – 9MM, Winchester-Western Rounds

7 _ Assorted Rounds of Ammunition(1-12 gauge; 5-9MM; 1-.357MM)

1 – Pistol Frame Marked National Guerre Herstal Belique, w/mag., SN: None

1 -- Winchester Model 94, .30-30 Caliber Rifle, SN: 2344417

1 – Great Wester Arms Corp. .45 Colt Revolver, SN: GW10555

3 – 45 Caliber Rounds

1 – United States Arms .38 Caliber Derringer, SN: 364

39 – Assorted Caliber Rounds of Ammunition

18 – .300 Caliber Rounds of Ammunition

37 – .32 Caliber) Rounds of Ammunition

20 – 12 Gauge Rounds pf Ammunition

158 – .22 Caliber Rounds of Ammunition

1 – Savage .30-06 Caliber Rifle, SN: F229050

1 – Remington Arms Co. .22 Caliber Rifle, SN: A1793556

1 – Weatherby Vanguard .300 Caliber Rifle, SN: Y212689

1 – 20 Gauge Shotgun SN: None

1 – TRW, Inc. 12 Gauge Shotgun, SN: 6807

1 – Winchester 16 Gauge Shotgun, SN: None

1 – Remington Arms Co. .22 Caliber Rifle, SN: None

1 – Remington Arms Co. Model Speedmaster 522, .22 Caliber Rifle, SN: 1826333,

C. If any of the property described in this forfeiture allegation, as a result of any act an omission of the defendant

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred and sold to, and deposited with a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall pursuant to Title 21, United States Code, Section 853 as incorporated by Title 28, United States Code, Section 2461(c), order the forfeiture of any other property of the defendant up to the value of any property described in paragraph B above, all in violation of Title 18, United States Code, Sections 922(g) and 924(d).

A TRUE BILL:

/s/ Christen J. Talbert, Jr.
Foreperson

/s/ Leura G. Canary
LEURA GARRETT CANARY
United States Attorney

/s/ Wm. H. McAbee II
WILLIAM H. McABEE II
Assistant United States Attorney

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

V.

MICHAEL RIDER JACKSON

JUDGMENT OF ACQUITTAL

(Filed Dec. 13, 2002)

CASE NUMBER: 02-95-N

The Defendant was found not guilty by a Jury on December 10, 2002. IT IS ORDERED that the Defendant is acquitted, discharged, and any bond exonerated.

/s/ Truman Hobbs
Signature of Judicial Officer

TRUMAN M. HOBBS, Senior U.S. District Judge
Name and Title of Judicial Officer

12/13/02
Date

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

UNITED STATES OF AMERICA	)	CR. No. CR-03-129-N
	)	[18 U.S.C. 922(g)(1)]
v.	)	INDICTMENT
MICHAEL RIDER JACKSON	)	(Filed Jun 10, 2003)

The Grand Jury charges:

COUNT 1

On about between February 2001 and April 9, 2001, in Lowndes and Butler Counties, within the Middle District of Alabama,

MICHAEL RIDER JACKSON,

defendant herein, having been convicted on or about November 9, 1979, of a felony, a crime punishable by imprisonment for a term exceeding one year under the laws of the State of Alabama, to-wit: Rape (CC-1979-938), in the Circuit Court of Mobile County, Alabama, did knowingly possess in and affecting commerce firearms, to-wit: an Arcadia Machine and Tool (AMT), Model Auto-Mag II, 22 Caliber, Pistol, serial number H31793, and a Ruger, Model Super Blackhawk, .44 Magnum Caliber, single action revolver, serial number 80-12015, in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATION

A. Count 1 of this indictment is hereby repeated and incorporated herein by reference.

B. Upon conviction for the violation of Title 18, United States Code, Section 922(g)(1), as alleged in Count 1 of this indictment, the defendant,

MICHAEL RIDER JACKSON,

shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924 and Section 2461(c), all firearms and ammunition involved in the commission of this offense, including but not limited to the following: an Arcadia Machine and Tool (AMT), Model Auto-Mag II, 22 Caliber, Pistol, serial number H31793, and a Ruger, Model Super Blackhawk, .44 Magnum Caliber, single action revolver, serial number 80-12015.

C. If any of the property described in this forfeiture allegation, as a result of any act or omission of the defendant

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred and sold to, and deposited with a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the United States, pursuant to Title 21, United States Code, Section 853 as incorporated by Title 28, United States Code, Section 2461(c), intends to seek an order of this Court forfeiting any other property of the defendant up to the

value of any property described in paragraph B above. All in violation of Title 18, United States Code, Sections 922(g) and 924(d)

A TRUE BILL:

/s/ Tina Burnett
Foreperson

/s/ Leura Garrett Canary
LEURA GARRETT CANARY
United States Attorney

/s/ John T. Harmon
John T. Harmon
Assistant United States Attorney

/s/ Patricia A. Snyder
Patricia A. Snyder
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA

vs

CR NO. 02-95-N

MICHAEL RIDER JACKSON,

Defendant.

* * * * * * * * * * *

JURY TRIAL PROCEEDINGS

* * * * * * * * * * *

BEFORE THE HONORABLE TRUMAN M. HOBBS, UNITED STATES DISTRICT JUDGE, and a jury, at Montgomery, Alabama, on Monday and Tuesday, December 9 and 10, 2002, commencing at 2:43 p.m. on Monday, December 9, 2002.

APPEARANCES:

FOR THE GOVERNMENT: Mr. William H. McAbee, II
Mr. John T. Harmon
(as indicated, 12/10/02)
Assistant United States Attorneys
OFFICE OF THE UNITED STATES ATTORNEY
One Court Square, Suite 201
Montgomery, Alabama 36104

FOR THE DEFENDANT: Mr. Michael J. Petersen,
Attorney at Law
631 South Perry Street
Montgomery, Alabama 36104

Proceedings reported stenographically;
transcript produced by computer.

* * * * * * * * * * *

[15] * * *

CHARLES CARTWRIGHT JACKSON, the witness, having been duly sworn, testified, as follows

DIRECT EXAMINATION

BY MR. McABEE

Q. Please state your full name, sir.

A. Charles Cartwright Jackson.

Q. And Mr. Jackson, what is your age, sir?

A. 44.

[16] Q. And where do you currently work, sir?

A. D&D Construction, Millbrook

Q. And what type of work do you do at the construction company?

A. Build houses.

Q. And are you a carpenter or roofer or what, sir?

A. Carpenter.

Q. How long have you been employed by the company where you now work?

A. Seven or eight years.

Q. And during that time, have you done the same type of work?

A. Yes, sir.

Q. I want to direct your attention back to earlier this year in around January of 2002. At that time, did you have occasion to be in the presence of Al Gadsden?

A. Yes, sir.

Q. Is Mr. Gadsden somebody that you know?

A. He's my probation officer.

Q. And is he your probation officer because you have been – or were convicted of the offense of stalking?

A. Yes, sir.

Q. And was that an offense that you were convicted of in your hometown?

A. Yes, sir. Wetumpka.

Q. And what county court did you appear in, sir?

A. Elmore County.

[17] Q. And did you receive a sentence?

A. Yes, sir.

Q. And was Mr. Gadsden your supervising probation officer?

A. Yes, sir.

Q. And did you report to him on a regular basis while you were working?

A. Yes, sir.

Q. And have you complied with your conditions of probation?

A. Yes, sir.

Q. You indicated in your interview in preparation of you being a witness that you were about to get off of your probation. Has that occurred, sir?

A. I'm supposed to get off tomorrow.

Q. So you will be reporting back to Mr. Gadsden at that point?

A. Yes, sir.

Q. Mr. Jackson, tell the members of the jury what your relationship is to the defendant, Michael Rider Jackson.

A. Brother.

Q. And are you an older or younger brother?

A. Younger.

Q. By how many years?

A. Two, three – two. Two years younger.

Q. I want to direct your attention again back to the time that you were with Al Gadsden around January or so of this year. At that time, did you have occasion or did it come about that you [18] had a conversation with him concerning your knowledge of whether or not your brother Michael had weapons at his home?

A. I'm the one that called him.

Q. And did you in fact state to him that that was what happened?

A. Yes, sir.

Q. And as a result of you telling Mr. Gadsden that your brother Michael had weapons at his house, did there come a time when Agent Mastin, the agent sitting here at this table, came to see you?

A. I asked Al Gadsden to get in touch with him for me.

Q. And did Mr. or Agent Mastin come and see you?

A. Yes, sir.

Q. And did you tell him what you knew about whether or not Michael had weapons?

A. Yes, sir.

Q. And what did you tell him?

A. I told Mr. Gadsden that my brother accused me of having a arsenal, and I turned around and told him he's the one that had the arsenal.

Q. And when you say arsenal, are you talking about – or what do you characterize as an arsenal?

A. I told him 15, 20 guns, 25, maybe.

Q. And is that what you told Agent Mastin?

A. Yes, sir.

[19] Q. And based on that interview, do you know whether or not Agent Mastin got a search warrant for your brother's residence?

A. I would think he did. Yes, sir.

Q. And I want to ask you this. The residence where your brother lived, do you know that street address?

A. It used to be 27 something. They changed it when they changed the 911. It's Old Stage Road, Greenville.

Q. Did you ever have occasion to live at that address?

A. Yes, sir, I did.

Q. And directing your attention back to 1991, say from around February to June of that year, did you in fact live at that house?

A. Yes, sir, I did.

Q. And while you were there –

A. Year of '99 or 2000, not '91.

Q. I'm sorry. 2000. And during that time, did you ever have occasion to personally observe Michael in possession of weapons?

A. Yes, sir, I did.

MR. McABEE: Your Honor, if I might approach, I wanted to show the defendant an exhibit.

THE COURT: Yes.

Q. I'm going to show you, sir, what's marked as Exhibits #8-A. #B, and #C, first asking you to examine Exhibit #8-A, and ask you whether or not you recognize that.

A. Yes, sir. That's his house trailer.

[20] Q. And is that the house –

A. Him and Karen's.

Q. Is that the house where you lived with him back in the year 2000?

A. Yes, sir.

Q. Okay. If you would, look to Exhibit #8-B. Do you recognize that?

A. Yes, sir, I do. That's their bedroom.

Q. And do you recognize the – what looks to be like a box of some kind there?

A. Yes, sir. I told the ATF man that he had two gun safes in his house.

Q. And do you recognize that as being one of them?

A. Yes, sir, I do.

Q. And the third picture, do you recognize those firearms as being similar to ones that you had seen in the house on previous occasions?

A. I could say they were similar to them. Yes, sir.

Q. Thank you, sir.

MR. McABEE: Your Honor, at this time the government would offer Exhibits #8-A, #B, and #C, the photographs.

THE COURT: All right, sir.

MR. McABEE: And Your Honor, rather than publishing these to the jury, the government requests permission to put them on our display screen.

[21] THE COURT: All right. Let's see if it will work (Brief pause).

THE CLERK: You have to mash the light on the – yes is the cap off?

MR. McABEE: Yes.

Q. (Mr. McAbee, continuing:) Mr. Jackson, directing your attention to the screen there in front of you to the item marked Exhibit #8-A, is this the house that you previously testified about?

A. Yes, sir, it is.

Q. And next, sir, directing your attention to Exhibit #8-B, is that the gun safe that you indicated?

A. One of them.

Q. And finally, see, Exhibit #8-C. Do you recognize that as a representation of the weapons that you've previously testified about?

A. Yes, sir.

Q. Thank you, sir. Now, Mr. Jackson, in preparation of you being a witness here, I showed you some weapons. And I'm going to pick these up here and show them to you but not go to your place. And I want to ask, looking at these, do you recognize this weapon as being one of the weapons I showed you during your pretrial preparation?

A. Yes, sir.

Q. And also, these other guns, this is marked as Exhibit #1. I [22] have here what's marked as Exhibit #2. Do you recognize this weapon?

A. Yes, sir.

Q. And this is Exhibit #5, a revolver. And finally, two rifles, sir, this one marked as Exhibit #4 and this one as Exhibit #3. And at the time that I interviewed you, sir, did you have a chance to inspect those?

A. I looked at them.

Q. And are you able to say that they are similar to the weapons that you saw –

A. Similar, yes, sir.

Q. – at your brother's house?

A. Yes, sir.

Q. Are they different in any way that you can tell?

A. I – they just look – they all look about the same to me.

Q. All right, sir. Thank you. Mr. Jackson, do you have a recollection or can you tell the jury whether or not you ever saw the defendant personally in possession of these as, for example, holding them in his hand or carrying them?

A. I'm going to say, yes, I have.

Q. And would you tell the members of the jury what type of weapons you personally have observed your brother Michael carry?

A. A pistol.

Q. And a pistol similar to the ones that we have here?

A. Yes, sir.

[23] MR. McABEE: Also, Your Honor, if I might approach on two other items.

Q. I'm going to show you what's marked as Exhibits #6 and #7 and ask you to examine those. As part of your preparation to be a witness here, were you asked to examine those previously, sir?

A. Yes, sir.

Q. And directing your attention to Exhibit #6, do you recognize that item?

A. Yes, sir, I do.

Q. And can you identify that?

A. Yes, sir.

Q. What is it?

A. The gun safe keys.

Q. And do you know who maintained possession of those keys?

A. Michael.

Q. And when you say Michael, you mean the defendant, your brother?

A. Yes, sir.

Q. Are there any other keys besides the gun safe keys on that key ring?

A. Yes, sir. There's other padlock keys on there. There's three other padlock keys and a P-38.

Q. And the wallet that is there, do you recognize that, sir?

A. Yes, sir, it's his. It's got his driver's license in it.

Q. And have you seen him in possession of that item on other [24] occasions?

A. Yes, sir, I have.

MR. McABEE: Thank you, sir.

The witness is tendered for examination, Your Honor.